Md Hamid Merican bin Abdul Kader Merican v Abdul Razak bin Hussain & Ors

HIGH COURT (KUALA LUMPUR) — NO D6–22–217 OF 2003
AMELIA TEE ABDULLAH JC
31 MAY 2010

Civil Procedure — Pleadings — Estoppel — Issues of estoppel, bad faith and quantum meruit not pleaded — Whether estoppel sufficiently pleaded if material facts giving rise to estoppel pleaded without mentioning estoppel — Rules of the High Court 1980 O 18 rr 7(1) & 8(1)

Contract — Agency — Principal and agent — Whether relationship of agency existed — Whether agency agreement orally created — Whether plaintiff appointed as defendant's agent for sale of shares — No written agency agreement — Whether agency relationship and terms could be established from surrounding evidence and contemporaneous documents

Revenue Law — Service tax — Collection — Carrying on taxable business and attempting to collect service tax without license — Whether offence under Service Tax Act 1975

The plaintiff claimed against the defendants a sum of RM14,570,000 comprising outstanding professional fees of RM4,570,000 and goodwill payment of RM10,000,000 and alternatively a sum of RM12,260,000 for services rendered as the agent of the defendants. According to the plaintiff, the second defendant on behalf of all the defendants orally appointed the plaintiff as their agent to assist them in selling certain shares ('the LUSB shares') for RM220m. The plaintiff was allegedly promised a professional fee of 2% of the share purchase price. The plaintiff then discussed with Gold Bridge Engineering & Construction Bhd ('Gold Bridge'), a potential buyer who had showed interest. The plaintiff claimed that the defendants also agreed to pay him an additional RM10m because they wanted the plaintiff to expedite the obtaining of approvals from the various authorities. According to the plaintiff, although he had found a willing purchaser (Gold Bridge) and although the Securities Commission had approved the sale, the defendants had later refused to go on with the sale to Gold Bridge and had instead sold the shares to Syarikat Mesra Kejaya ('Mesra') at the same price as that offered to Gold Bridge. The plaintiff argued that by selling to Mesra, the defendants saved on the commission of RM4,570,000 and goodwill payment of

RM10m that were payable to him. The plaintiff insisted that he was entitled to his commission whether the defendants sold to Gold Bridge or to Mesra. His claims were disputed by the defendants who contended that there was no contractual relationship between them as they had never appointed the plaintiff as their agent. They further argued that even if there was a contract, it had been validly terminated. The defendants admitted that there was arrangement that if the sale to Gold Bridge was successfully completed, they would pay the plaintiff half of what the plaintiff had asked, ie 50% of the 1% of the purchase price as professional fees. The defendants also pleaded that the plaintiff did not hold a license to render the alleged services and to collect service tax and hence his claim could not be enforced. The plaintiff also raised various other issues such as estoppel, bad faith and quantum meruit.

Held, dismissing the plaintiff's claim with costs:

(1) There was no written agency agreement between the plaintiff and the defendants. Therefore, the court had to look at the supporting and surrounding evidence and contemporaneous documents to determine whether the plaintiff had successfully established that he was appointed as agent and, if so, the terms of such appointment (see paras 60–61).

(2) From the totality of the evidence adduced, the plaintiff had not succeeded in proving, on a balance of probabilities, that he had been appointed by the defendants as their agent. The actions of the parties were more indicative of there being no such agreement at the onset. The defendants were of the belief that the plaintiff was the agent of Gold Bridge and contemporaneous documents supported this finding (see para 73).

(3) The sale of the LUSB shares was never completed. Since payment of professional fees was dependant and conditional upon the successful completion of the sale to Gold Bridge, the eventual termination of the sale to Gold Bridge rendered the defendants no longer liable to pay any sums to the plaintiff. The plaintiff's allegation that the defendants deliberately refused to complete the sale to Gold Bridge but chose to sign with Mesra merely to avoid paying professional fees and goodwill payment to the plaintiff was totally devoid of merit. It was obvious that the proposed sale to Gold Bridge, having dragged on for a considerable length of time whilst awaiting the various approvals, would have dragged on even more whilst Gold Bridge sought to appeal against Securities Commission's conditional approval, would not have brought the same consideration to the defendants as the sale to Mesra. As such, the plaintiff failed to make out a case against the defendants for payment of professional fees on a balance of probabilities (see paras 75–76).

(4) Upon considering the totality of the evidence, the court could not accept the plaintiff's contention that he was promised a goodwill payment of RM10m for obtaining or even expediting the obtaining of the said approvals (see para 84).

(5) The issues of estoppel, bad faith and quantum meruit raised by the plaintiff were not pleaded and were raised for the first time during submissions. It was also not part of the list of issues to be tried as agreed between the parties. Estoppel is a matter which is required to be pleaded under the rules of the court, as exemplified by rr 7(1) and 8(1) of O 18 of the Rules of the High Court 1980. However, the requirement of these rules is sufficiently met if material facts giving rise to estoppel are sufficiently pleaded without actually using the term 'estopped'. However, the plaintiff's complaints about estoppels, unjust enrichment and quantum meruit were unsupportable (see paras 86, 88 & 91).

(6) Since the plaintiff did not possess a license to collect service tax, the plaintiff was guilty of an offence under the Service Tax Act 1975 for carrying on a taxable business and attempting to collect service tax without a license (see para 93).

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan-defendan bagi wang sejumlah RM14,570,000 yang terdiri daripada yuran profesional tertunggak RM4,570,000 dan wang ehsan RM10,000,000 dan secara alternatif wang sejumlah RM12,260,000 bagi perkhidmatan yang diberikan sebagai ejen defendan-defendan. Menurut plaintif, defendan kedua bagi pihak kesemua defendan secara lisan melantik plaintif sebagai ejen mereka bagi membantu mereka dalam menjual saham-saham tertentu ('saham LUSB') berjumlah RM220 juta. Plaintif dikatakan dijanjikan bayaran profesional sebanyak 2% daripada harga pembelian saham. Plaintif kemudiannya berbincang dengan Gold Bridge Engineering & Construction Berhad ('Gold Bridge'), pembeli berpotensi yang telah menunjukkan minatnya. Plaintif mendakwa bahawa defendan-defendan juga bersetuju membayarnya RM10 juta sebagai tambahan kerana mereka mahu plaintif mempercepatkan perolehan kelulusan daripada pelbagai pihak berkuasa. Menurut plaintif, walaupun dia telah menemui seorang pembeli yang bersedia (Gold Bridge) dan walaupun Suruhanjaya Sekuriti telah meluluskan penjualan tersebut, defendan-defendan kemudian telah enggan meneruskan dengan jualan tersebut kepada Gold Bridge dan sebaliknya telah menjual saham-saham tersebut kepada Syarikat Mesra Kejaya ('Mesra') pada harga sama yang ditawarkan kepada Gold Bridge. Plaintif menghujah bahawa dengan penjualan kepada Mesra, defendan-defendan menjimatkan komisen sebanyak RM4,570,000 dan wang ehsan sebanyak RM10 juta yang harus dibayar kepadanya. Plaintif menegaskan bahawa dia berhak terhadap komisennya sama ada defendan-defendan menjual kepada Gold Bridge atau kepada

Mesra. Tuntutannya dipertikaikan oleh defendan-defendan yang menyatakan bahawa tidak ada hubungan kontrak di antara mereka kerana mereka tidak pernah melantik plaintif sebagai ejen mereka. Mereka seterusnya menghujah jika sekalipun terdapat kontrak, ia telah dengan sahnya ditamatkan. Defendan-defendan mengaku yang terdapat persefahaman bahawa jika jualan kepada Gold Bridge berjaya diselesaikan, mereka akan membayar plaintif separuh daripada apa yang diminta oleh plaintif, iaitu 50% daripada 1% harga belian sebagai yuran profesional. Defendan-defendan juga memplidkan bahawa plaintif tidak mempunyai lesen untuk memberi perkhidmatan yang dikatakan dan memungut cukai perkhidmatan dan oleh itu tuntutannya tidak boleh dikuatkuasakan. Plaintif juga menimbulkan pelbagai isu-isu lain seperti estopel, niat jahat dan quantum meruit.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Tidak ada perjanjian agensi bertulis antara plaintif dan defendan-defendan. Oleh itu, mahkamah perlu melihat bukti-bukti menyokong dan keadaan sekitar dan dokumen-dokumen semasa bagi menentukan sama ada plaintif telah berjaya membuktikan bahawa dia telah dilantik sebagai ejen dan, jika demikian, syarat-syarat pelantikannya (lihat perenggan 60–61).

(2) Daripada keseluruhan bukti yang dikemukakan, plaintif tidak berjaya dalam membuktikan, atas imbangan kebarangkalian, bahawa dia telah dilantik oleh defendan-defendan sebagai ejen mereka. Tindakan pihak-pihak lebih menunjukkan bahawa tiada perjanjian sedemikian sejak dari permulaannya. Defendan-defendan percaya bahawa plaintif ialah ejen Gold Bridge dan dokumen-dokumen semasa menyokong pendapat ini (lihat perenggan 73).

(3) Jualan saham LUSB tidak pernah diselesaikan. Oleh sebab pembayaran yuran profesional adalah bertanggungan dan bersyarat atas kejayaan penyelesaian jualan kepada Gold Bridge, penamatan jualan kepada Gold Bridge menyebabkan defendan-defendan tidak lagi bertanggungan untuk membayar apa-apa jumlah kepada plaintif. Dakwaan plaintif bahawa defendan-defendan sengaja enggan menyelesaikan jualan kepada Gold Bridge tetapi memilih untuk menandatangani jualan dengan Mesra hanyalah untuk mengelak daripada membayar yuran profesional dan wang ehsan kepada plaintif adalah sama sekali tidak bermerit. Jelas bahawa jualan yang dicadangkan kepada Gold Bridge, telah mengambil satu masa yang panjang sementara menunggu pelbagai kelulusan, dan mungkin berlarutan lebih panjang sementara Gold Bridge memohon untuk merayu terhadap kelulusan bersyarat Suruhanjaya Sekuriti, tidak akan memberikan pulangan yang sama seperti jualan kepada Mesra kepada defendan-defendan. Oleh itu, plaintif gagal untuk membuktikan kes

terhadap defendan-defendan untuk pembayaran yuran profesional atas imbangan kebarangkalian (lihat perenggan 75–76).

(4) Selepas mempertimbangkan keseluruhan bukti, mahkamah tidak dapat menerima hujahan plaintif bahawa dia telah dijanjikan wang ehsan RM10 juta bagi mendapatkan atau mempercepatkan perolehan kelulusan tersebut (lihat perenggan 84).

(5) Isu-isu estopel, niat jahat dan quantum meruit yang dibangkitkan oleh plaintif tidak diplid dan telah diutarakan buat pertama kali semasa penghujahan. Ia juga bukan sebahagian daripada senarai isu-isu untuk dibicarakan sebagaimana yang dipersetujui antara pihak-pihak. Estopel ialah perkara yang mesti diplidkan di bawah kaedah-kaedah mahkamah, seperti yang dinyatakan di dalam kk 7(1) dan 8(1) A 18 Kaedah-kaedah Mahkamah Tinggi 1980. Walau bagaimanapun, keperluan kaedah-kaedah ini dipenuhi jika fakta-fakta material membentuk kepada estopel telah diplidkan tanpa menggunakan ayat 'diestop'. Walau bagaimanapun, aduan-aduan plaintif tentang estopel, pengayaan tidak patut dan *quantum meruit* tidak boleh disokong (lihat perenggan 86, 88 & 91).

(6) Memandangkan plaintif tidak memiliki lesen bagi memungut cukai perkhidmatan, plaintif bersalah atas kesalahan di bawah Akta Cukai Perkhidmatan 1975 bagi menjalankan perniagaan yang boleh dikenakan cukai dan cuba untuk memungut cukai perkhidmatan tanpa lesen (lihat perenggan 93).]

Notes

For a case on estoppel, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 5394.

For a case on service tax in general, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) para 2519.

For cases on principal and agent, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2452–2453.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

David Wong Hon Leong v Noorazman bin Adnan [1995] 3 MLJ 283; [1995] 4 CLJ 155, CA (distd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239, SC (refd)

Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 18 rr 7(1), 8(1)
Service Tax Act 1975 s 8(1)
Service Tax Regulations 1975

John Khoo (Ismail, Khoo & Associates) for the plaintiff.
TP Ling (Ahmad Zamri with him) (Che Mokhtar & Ling) for the defendants.

Amelia Tee Abdullah JC:

[1] The plaintiff, Md Hamid Merican bin Abdul Kader Merican (PW1), describes himself as a business consultant and registered estate agent. His claim against the defendants is for a sum of RM14,570,000 comprising outstanding professional fees of RM4,570,000 and goodwill payment of RM10,000,000, interests and costs and alternatively, a sum of RM12,260,000, interests and costs for services rendered as agent of the defendants. His claims are disputed by the defendants who contend that there is no contractual relationship between them as they had never appointed the plaintiff as their agent. They further argue that even if there was a contract, it had been validly terminated. In the alternative, the defendants have pleaded that the plaintiff does not hold a license to render the alleged services and to collect service tax and hence his claim cannot be enforced.

THE PLAINTIFF'S CASE

[2] The plaintiff, Md Hamid Merican bin Abdul Kader Merican (PW1), states that he is a registered estate agent and has been issued with certificates to practice estate agency for the years 2001, 2002 and 2003. However, the court notes that the instant case does not involve real estate. The defendants, Abdul Razak bin Hussain, Mustaffa Kamil bin Md Ismail, Rauyah Bee bt Abdul Hamid, Norhaili bt Mohd Jelan, Kamarudin bin Idris, Abdul Rashid bin Mohd Yusoff, Mustaffa bin Mohd Som, Zainol Haris bin Hj Hassan and Omar bin Abdullah were shareholders of Landas Utama Sdn Bhd ('LUSB'). The plaintiff knew the second defendant before September 2000 and it was from him that the plaintiff learnt that the defendants were the owners of LUSB.

[3] The plaintiff testified that the second defendant approached him around August 2000 saying that the defendants wanted to sell their shares in LUSB and asking him to find a willing buyer. The plaintiff then discussed with Gold Bridge Engineering & Construction Bhd ('Gold Bridge'), a potential buyer who had showed interest. According to the plaintiff, around early September 2000, Mustaffa Kamil bin Md Ismail (the second defendant), 'on behalf of all the defendants', orally appointed him as their

agent. A meeting took place at the Imperial Hotel, Kuala Lumpur, where the plaintiff was requested to find a purchaser willing to purchase their shares in LUSB and was promised a professional fee of 2% of the share purchase price amounting to RM220,000,000 for services rendered. When asked whether he had an interested buyer in mind at this meeting, the plaintiff's response was that the interested buyer he had in mind at that time was Gold Bridge. He admitted that he was the one who had informed Gold Bridge that the LUSB shares were for sale.

[4] What were the terms of his appointment for such a lucrative compensation? The court notes that in answer 14 of his witness statement, the plaintiff states as follows:

> The terms and conditions of my appointment as the Defendants' agent were, inter alia, as follows:-
>
> (a) I was required to find a purchaser willing to purchase the Defendants' shares in the said Company;
>
> (b) I was required to negotiate with the purchaser, on behalf of the Defendants, with respect to the terms and conditions of the sale and purchase of the Defendants' shares in the said Company;
>
> (c) I was required to take steps to obtain the necessary approvals from the relevant authorities, amongst others from the Economic Planning Unit ('UPU'), the Foreign Investment Committee ('FIC'), Securities Commission ('SC'), the Ministry of Finance and the Prime Minister; and
>
> (d) I was also required to take *such further actions necessary to ensure that the transaction stated above is successfully completed*. (Emphasis added.)

[5] The plaintiff told the court that around September 2000, he introduced Gold Bridge to the defendants. A meeting was held at the Sheraton Imperial Kuala Lumpur between the first, second and third defendants, the plaintiff and representatives of Gold Bridge to discuss and negotiate on the terms of the sale and purchase of the defendants' shares. Several meetings were held, with a final meeting on 3 October 2000.

[6] The plaintiff was cross-examined as to why no agreement was drawn up to clearly specify the alleged agreement to pay him 2% of RM220m, which was a big amount of money. His response was an enigmatic 'I trusted them'.

[7] Vide a letter of undertaking dated 5 February 2001, Melor Pertama Capital Management Sdn Bhd confirmed with the defendants their intention to acquire the entire paid up capital of LUSB for a sum of RM220m. Pursuant to the terms of the said letter, a deposit of RM1m was paid to Messrs Nik Saghir & Ismail as stakeholders.

[8] The plaintiff further testified that at a meeting held on 9 August 2001, the first defendant had given specific instructions with regard to the sale and purchase of their shares. The plaintiff claims that the first defendant (allegedly on behalf of all the defendants) 'also agreed to (pay) me a further sum of RM6,700,000 as goodwill, in addition to the professional fee of 2% of the share sale purchase price amounting to RM220,000,000'. The plaintiff relies on the document at p 65 of the bundle of documents (BOD) in support of this contention.

[9] According to the plaintiff, there was a variation of the RM6.7m goodwill payment when the defendants, through the first defendant, allegedly confirmed in writing their instructions of 9 August 2001 and increased the goodwill payment from RM6.7m to RM10m. The plaintiff relies on the second defendant's letter dated 10 August 2001 (pp 9–10 of BOD) in support of this contention. During cross-examination, he agreed that if there was a delay in signing and completing the sale, more monies would have to be paid to the bank. He agreed that there was no document which shows that the defendants had agreed to pay him RM10m although later in his submissions he contends otherwise. However, he disagreed that the RM10m was clearly a discount for a speedy conclusion of the deal.

[10] When cross-examined as to why the defendants would have agreed to pay him an additional RM10m if 2% was the standard market practice, the plaintiff offered the explanation that the shares in the market was going down from RM1.50 to RM1 and the defendants were getting worried. They did not want to face the bank and thus wanted the plaintiff to expedite the obtaining of approvals from the various authorities. The RM10m, he said, was for getting the approvals. The agent's function was only to introduce the buyer.

[11] Vide a letter dated 28 February 2002 (p 11 of BOD), the Ministry of Finance informed Gold Bridge that the honorable Prime Minister had approved its application to purchase the defendants' entire shareholdings in LUSB. The defendants and Gold Bridge then entered into a share sale agreement on 19 March 2001 where Gold Bridge agreed to purchase the defendants' shares for RM220m *subject to the conditions stipulated in the said share sale agreement*. The court notes that the plaintiff did not write to or ask the defendants for payment of fees *before* the signing of the agreement. Neither was there a request to be paid *after* the signing. When asked why, the plaintiff again offered the explanation: 'I trusted them'.

[12] Under cl 3.1 of the share sale agreement, it was the duty of the purchaser to obtain the necessary approvals. When asked why the defendants should engage him to do something which the purchaser was supposed to do, the plaintiff retorted with:

> The purchaser has not done this — that is why I had to do it.

[13] Vide a letter dated 2 October 2002 (p 44 of BOD), the Economic Planning Unit of the Prime Minister's Department informed Alliance Merchant Bank Bhd that the Foreign Investment Committee ('FIC') had no objections to, inter alia, the acquisition of the entire paid up capital of LUSB. And on 31 October 2001, the Ministry of Finance agreed with the contents of a proposed supplementary agreement submitted by Gold Bridge in relation to the sale and purchase of the LUSB shares.

[14] The letter found at pp 66–67 of BOD forms an integral part of the plaintiff's case. He places considerable reliance on this letter dated 31 October 2002 in support of his claim as to fees. The plaintiff states that in this letter, he had:

(a) informed and reminded the defendants about his professional fees;

(b) reminded the defendants to pay RM50,000, being part payment of his professional fees, to Messrs Nik Saghir & Ismail as stakeholder; and

(c) proposed to the defendants that the outstanding balance of his professional fees was to be deducted from the outstanding balance of the purchase price to be paid to the defendants by Gold Bridge. None of the defendants had objected to this letter.

[15] The plaintiff was cross-examined as regards the opening line of this letter which reads as follows: 'I refer to the above transaction in respect of which I acted *as agent for* the purposes, amongst other things... .' He was queried as to why he did not state clearly that he acted as agent for the defendants if indeed that was so. The court records the following pertinent exchange:

Q: If it is true that the defendants engaged you, the letter would have clearly stated that you acted as the defendants' agent?

A: Because I acted for the vendor as well as the purchaser.

[16] The plaintiff was also asked why he had claimed for 1% in his letter of 31 October 2002 when in paras 13 and 20 of his statement of claim he had asked for 2%. He offered the explanation that originally the defendants had agreed to 2% but that after the approval of the Ministry of Finance was obtained, they had requested for the purchaser to pay half the professional

fees. He confirmed that he had agreed to this arrangement. When asked why he had still sued the defendants for 2% if he had agreed with the arrangement, his answer was that because of the defendants' termination of the agreement, he could not claim from Gold Bridge.

[17] The plaintiff states that pursuant to his letter of 31 October 2001, LUSB had on 5 November 2001 paid RM50,000 as part payment of his professional fees to Messrs Nik Saghir & Ismail as stakeholder. He was informed that the balance of the fees due will be paid upon successful completion of the share sale agreement.

[18] At the point in time when the RM50,000 interim payment was paid, the approval of the Securities Commission ('SC') had not yet been obtained. Gold Bridge's application to acquire LUSB's shares was finally approved by SC on 18 November 2002, but *subject to conditions*. It is the plaintiff's case that 'he was heavily involved in the discussions and meetings with the relevant authorities and had taken all reasonable steps to assist in obtaining the approvals from the authorities' and that he had 'ensured that the transaction stated above was successfully completed'. There are obvious differences of opinion as to whether the transaction was in fact successfully completed.

[19] The plaintiff complained that vide a letter dated 31 November 2002 (p 58 of BOD) addressed to Gold Bridge, the defendants, through their solicitors, terminated the share sale agreement citing cl 3.6 of the agreement. He testified that the defendants' allegation that they would only get RM213m instead of RM220m was not true because the buyer had said that they were willing to top up the difference and undertake to fully settle all monies due and owing to the Ministry of Finance. Further, it is the plaintiffs case that the first defendant, on behalf of all the defendants, had 'agreed to withhold the issuance of the said letter pending the outcome of a meeting between the representatives of Gold Bridge' and the defendants on 9 December 2002.

[20] In his supplementary witness statement, the plaintiff states that SC approved the sale at a price of RM213,308,778. He argues that if the RM10m was really a discount, then he queries why the defendants did not complete the sale since RM213,308,778 is more than RM220m less RM10m = RM210m. Based on this argument, he is insistent that the RM10m is not a discount to the purchaser but a goodwill payment to him, increased from the RM6.7m agreed to earlier. When asked why the defendants should be willing to make a goodwill payment of RM10m, the plaintiff offered the explanation that the shares were under moratorium for a period of three years. He had to assist in obtaining the approval of the Ministry of Finance

to have the moratorium lifted. Furthermore, the defendants would have had to pay interest for the balance of the three years' period and an earlier sale would have saved them money.

[21] The plaintiff contends that although cl 16 of the share sale agreement states that the professional fees in respect of the transaction was to be borne equally by the parties, however since it was the defendants who terminated the agreement and not Gold Bridge, he was entitled to demand the total outstanding professional fees from the defendants. He contends that he had found a willing purchaser but the defendants refused to go through with the sale 'although the Securities Commission (had) approved the sale'. He argues that the sale of the shares to Syarikat Mesra Kejaya ('Mesra') on 5 December 2002, the same day as the date of the letter to Gold Bridge, shows bad faith. The defendants sold the shares to Mesra at RM220m, the same price as that offered to Gold Bridge. The plaintiff argues that the defendants would have made RM88m, whether they sold to Mesra or to Gold Bridge. However, by selling to Mesra, they would have saved on the commission of RM4,570,000 and goodwill payment of RM10m that were payable to him. He pointed out that where an estate agent sells a client's property but the buyer aborts the sale after the agreement is signed, the vendor would still have to pay a minimum of 50% of the commission. He insisted during re-examination that he was entitled to his commission whether the defendants sold to Gold Bridge or to Mesra.

[22] The plaintiff's claim in his letter dated 31 December 2002 (p 66) was for RM2,310,000. On 14 January 2003, vide Messrs Ghazi & Lim's letter (pp 73–75), his claim had increased to RM4,570,000. He admitted that there was no claim for RM10m in his solicitor's letter. When asked why, his answer was that 'I don't know if my lawyer forgot to claim'. When further questioned about this claim for RM10m appearing in the statement of claim, the plaintiff admitted that it was his decision to include this claim although he denied that it was an afterthought conceived by him to frighten and intimidate the defendants so that they would pay him something.

[23] The court notes that during re-examination, the plaintiff first raised the name of Datuk Abdul Aziz bin Sheikh Fadzir as being a person who was allegedly present at a meeting with the first defendant when the promise of a RM10m goodwill payment was made. Learned counsel for the defendants had objected to this line of questioning on the basis that it was not in the witness statement and neither was it pleaded. The court allowed the questions and the calling of the said Datuk Aziz as a witness. However, the amount of weight that is to be attached to his testimony as well as the plaintiff's evidence in this regard would be weighed by the court in due course.

[24] On 29 January 2003, in response to the plaintiff's demand on 14 January 2003, the defendants, through their solicitors, Messrs Che Mokhtar & Ling, denied engaging the plaintiff as their agent. They denied that they had made a payment of RM50,000 to the plaintiff alleging instead that it was LUSB that had done so. In light of the fact that the share sale to Gold Bridge had been terminated, they wanted the monies returned to LUSB.

[25] Despite various demands, the defendant have failed, refused or neglected to pay the professional fees of RM4,570,000 or the goodwill payment of RM10m. The plaintiff thus claims from the defendants RM4,570,000 and RM10m with interest of 8% from the date of filing until date of full settlement and costs. Alternatively, he claims a sum of RM2,260,000 being the equal portion of his professional fees and a further sum of RM10m with interest of 8% thereon from the date of filing until the date of full settlement and costs.

[26] The plaintiff's claim against the defendants include a claim for government tax at the rate of 5% of RM4,400,000 = RM220,000. He admitted that he neither possessed a license to collect service tax under the Service Tax Act 1975 nor had he applied for one. He testified that he did not apply for one because 'I do not require a license'. He told the court that he *knew* that it was not illegal to provide this type of service and to collect or attempt to collect service tax without a license.

[27] The plaintiff called Abdul Aziz bin Sheikh Fadzir ('PW2') as his witness. As mentioned earlier, the circumstances under which this witness came to be called as a witness has to be noted. He was not initially in the plaintiff's list of witnesses and was not mentioned at all either in the plaintiff's witness statement or supplementary witness statement. He was called to corroborate the plaintiff's evidence that the first defendant had promised to give a goodwill payment of RM6.7m to him.

[28] PW2 is a Director of Gold Bridge which had wanted to buy the defendants' shares in LUSB. According to him, the plaintiff was the defendants' agent.

[29] PW2 testified about a meeting, possibly on 9 August 2000, between the plaintiff, Datuk Abdul Razak (the first defendant) and himself where he heard the first defendant 'saying that he will give goodwill of RM6.7m to Hamid Merican'. This was for 'doing a lot of work getting various approvals from the ministries'. The plaintiff was negotiating for RM10m but PW2 left the meeting earlier. A day or two later, the plaintiff came to see him with a

letter and said that the defendants had agreed to give him RM10m. This was the only occasion that he heard the first defendant or any other defendant mention the RM10m.

[30] During cross-examination, PW2 agreed that pursuant to the share sale agreement, approvals were to be obtained by the purchaser, Gold Bridge. He confessed not to know why the defendants should pay the plaintiff the princely sum of RM6.7m to get the approvals.

[31] PW2 was referred to para 5 of the plaintiff's reply where the plaintiff had pleaded that at the meeting on 9 August 2001, PW2 'ada mencadangkan agar defendan pertama mengurangkan harga belian saham-saham tersebut sebelum meninggalkan mesyuarat itu'. Notwithstanding the fact that the plaintiff had pleaded as such, PW2 still maintained that he did not ask for a discount. PW2 was also referred to the second defendant's letter of 10 August 2001 (p 9 of BOD) which he identified as that which was shown to him by the plaintiff. With reference to the words 'A discount of RM10m to be granted for goodwill' appearing therein, PW2 admitted that it was possible that the RM10m was a discount to the purchase price.

THE DEFENDANTS' CASE

[32] The second defendant Mustaffa Kamil bin Md Ismail ('DW1') was the Senior General Manager of UDA Holdings before his retirement and as such would admittedly have had about 30 years' experience dealing with property. He testified that in early September 2000, he attended a meeting initiated by the plaintiff. He was informed that the plaintiff had an interested party who wished to buy all the defendants' shares in LUSB. DW1 disputed the plaintiff's allegation that he and the rest of the defendants had appointed the plaintiff as their agent to find a buyer, to negotiate the terms of the sale, to get the necessary approvals from the authorities and to do all such other things as may be necessary to complete the sale and that in return they had agreed to pay the plaintiff 2% of the purchase price as consideration. He denied categorically that the defendants had appointed the plaintiff to do anything for them. He also denied that there was an agreement to pay the plaintiff fees to secure the purchase. On the contrary, he and the other defendants had thought that the plaintiff was the agent for the interested buyer.

[33] DW1 admitted that a meeting was held in September 2000 with the plaintiff, representatives of Gold Bridge together with the first and third defendants at the Sheraton Imperial Hotel, Kuala Lumpur, to discuss the terms for the sale to Gold Bridge. Subsequently a few other meetings were held to discuss the same issue. He was informed that Gold Bridge might want

to use Melor Permata Capital Management Sdn Bhd ('Melor Permata') as a vehicle for the acquisition of the shares. Their first contact with Melor was when they received an offer dated 5 February 2001 to purchase the entire paid up share capital of LUSB for RM220m. In principle, the defendants accepted the offer as evidenced by the signatures of the second and third defendants on the duplicate copy of the said letter.

[34] DW1 (the second defendant) was not present at the meeting on 9 August 2001. It was the first defendant who was present. After the meeting, the first defendant had called for a meeting with all the defendants to brief them about the negotiations. The sale price was RM220m. Gold Bridge wanted a discount of RM10m. Initially, the defendants would only agree to a discount of RM6.7m but after further deliberations, a discount of RM10m was agreed to provided that the sale could be concluded by 18 April 2002. The reason for this was because the defendants had a loan with the bank and they would be billed additional interest if there was a delay in payment.

[35] It was following their meeting that DW1 issued the letter dated 10 August 2001 (p 9–10 of BOD) to the plaintiff. He explained that the letter was issued because they thought that the plaintiff was the agent of Gold Bridge and would convey the contents of the letter to his principal. He argued that if the plaintiff was indeed the defendants' agent, he would not need to write to the plaintiff at all. He clarified that the discount of RM10m stated in the letter was merely a discount to the sale price if the buyer could satisfy certain conditions and not a payment promised to the plaintiff.

[36] Messrs Nik Saghir & Ismail were the solicitors engaged by the defendants and agreed to by Gold Bridge. It was their role to prepare the share sale agreement.

[37] When the share sale agreement was signed on 19 March 2002, the plaintiff did not ask any of the defendants for fees. Due to the failure of Gold Bridge to apply for the authorities' consent in accordance with the agreement, the defendants terminated the agreement on 1 August 2002. However, at the request of Gold Bridge and in consideration of RM1m which was paid on 12 August 2002, the defendants agreed to grant an extension until 15 October 2002 to enable Gold Bridge to apply for the necessary consents.

[38] DW1 told the court that the remuneration of the plaintiff was never discussed at any of their meetings. The first time he received any indication that the plaintiff wished to claim fees from the defendants was when they received the notice dated 31 October 2002 (p 66). The defendants were surprised with this notice as they had thought that the plaintiff was the agent of the buyer and his fees would therefore be paid by the buyer. Thus when

A the plaintiff appealed to be paid 1% of the purchase price, the defendants had a discussion amongst themselves to consider his appeal. They noted the plaintiff's plea that Gold Bridge had not paid him anything and he had done some work. He was from Penang and had incurred travelling and hotel expenses. After consideration, it was agreed to pay him RM50,000 to defray B his expenses. It was also agreed that if the sale to Gold Bridge was *successfully completed*, they would pay him half or what was asked, that is half of the 1% of the purchase price. DW1 explained that 'Successful completion means all approvals given and as agreed with no conditions detrimental to the defendants. Also the full purchase price settled in full'. This payment was C purely on an ex gratia basis because they had no obligation to pay the plaintiff. However, during cross-examination, DW1 admitted that neither he nor the other defendants objected to this letter. He agreed that they had in fact acted upon the plaintiff's request for part payment of his professional fees.

D

[39] DW1 testified that the sale of the LUSB shares to Gold Bridge was unsuccessful because the SC's conditional approval contained conditions not agreed upon by the defendants. The purchase price to Gold Bridge was to be RM220m. The SC approved only RM213m. Accordingly, the sale was E terminated. He disagreed that whether the defendants sold to Gold Bridge or to Mesra, they would have got RM88m. Messrs Nik Saghir & Ismail were directed to issue the termination letter dated 3 December 2002 and the letter was personally delivered to PW2 by the first defendant on 5 December 2002 in the presence of the third and the eighth defendants. He agreed that on the F same day that he handed the termination letter to PW2, the defendants signed with the new purchaser.

[40] DW1 explained that the defendants had commenced talks with the new purchaser about a month before 5 December 2002. He denied that the G defendants had acted in bad faith when they did not go through with the deal with Gold Bridge because they wanted to save on the plaintiff's professional fees. He pointed out that the plaintiff was not a party to the share sale agreement. Furthermore, there was no clause in the agreement which says that if it was terminated, the defendants would have to pay all the plaintiff's H fees.

[41] In cross-examination, DW1 admitted that he was actively involved in the negotiations and had met the plaintiff about 30–40 times. Sometimes he I would call the plaintiff over the phone. The success of the deal depended on the approvals from the various agencies and, as such, DW1 was chasing the plaintiff every now to find out about the approvals.

[42] The amount claimed by the plaintiff vide his solicitor's letter dated 14 January 2003 was RM4,570,000. In the statement of claim, his claim had ballooned to RM4,570,000 + RM10m = RM14,570,000 with an alternative claim for RM2,260,000 + RM10m = RM12,260,000. A

[43] For completion, it was pointed out by DW1 that Gold Bridge had taken the case of the defendants' termination of the share sale agreement to the High Court. The High Court decided that the agreement was validly terminated. Gold Bridge's appeal to the Court of Appeal was also dismissed. B

[44] Before her retirement, the third defendant, Rauyah Bee bt Abdul Hamid (DW2), was a senior manager in charge of finance at UDA Holdings Bhd. C

[45] With reference to the plaintiff's letter dated 31 October 2002 (pp 66–67), DW2 admitted that they had requested for the letter from the plaintiff. She explained that she was one of the directors of LUSB and in charge of finance and an accountant by profession. Thus when the plaintiff approached her for some payment to be made to him since Gold Bridge had not paid him anything at all, she told him that she needed to have something in writing for her to make any payment at all since there was nothing stated about fees in any of the documents that she had. She identified the signature below the word 'Terima' in p 67 as her signature. She explained that she wrote the word 'Terima' because the plaintiff had asked her to acknowledge receipt of the letter. D E F

[46] DW2 admitted that she did not challenge pp 66–67 in writing but maintained that she did so verbally. After the defendants' meeting, she, the first defendant, eighth defendant and ninth defendant had a meeting with the plaintiff where they told him that they would pay him half of the 1% if the deal went through. She disagreed that pp 66–67 constituted a contract between the parties. She admitted issuing and signing the letter dated 5 November 2002 (p 49) to the plaintiff on the instructions of all the defendants. G H

[47] According to DW2, the defendants did not engage the plaintiff as their agent to sell their LUSB shares. To their understanding, the plaintiff was the agent or representative of Gold Bridge. She was present during the meeting in September at the Sheraton Imperial Hotel Kuala Lumpur and the impression that she got was that the plaintiff represented the buyer, Gold Bridge. She further testified that if they had engaged the plaintiff as their agent, they would have paid him some fees when the share sale agreement was signed on 19 March 2002. I

[48] DW2 corroborated the evidence of DW1 when she explained why the defendants had paid the plaintiff RM50,000. Following the appeal from the plaintiff, the defendants met and discussed the matter and agreed to pay the plaintiff 50% of what he had asked for on an ex gratia basis, if the sale to Gold Bridge was successful. At that stage, they had received a non-refundable sum of RM1m from Gold Bridge and out of kindness agreed to advance him RM50,000 as interim payment in anticipation of the sale being successful. As such, the words 'The balance of the fees due from the vendors will be paid upon successful completion of the sale and purchase agreement' meant that the balance of the 1/2% of the sale price will be paid upon the successful completion of the agreement.

[49] The sale was not successfully completed. The agreement was lawfully terminated as decided by the High Court and confirmed by the Court of Appeal.

[50] The first defendant, Datuk Abdul Razak bin Hussain ('DW3'), was the managing director of UDA Holdings before his retirement. He confirmed that the plaintiff was present at the meeting on 9 August 2001 with PW2, the managing director of Gold Bridge. At all these meetings, DW3 thought that the plaintiff was the agent of Gold Bridge and that he was assisting Gold Bridge in closing the deal re the LUSB shares.

[51] DW3 testified that at the meeting on 9 August 2001, he discussed with PW2 about the terms for the sale of LUSB shares, in particular, the consideration. PW2 had asked for the price to be reduced by RM10m. He agreed to reduce the price by RM6.7m *but subject to the following condition*:

(a) The balance of the purchase price must be paid by 18 April 2002;

(b) Payment must be made in cash; and

(c) The discount is subject to the agreement of the other shareholders/defendants.

[52] DW3 corroborated the testimony of DW1 and DW2 to the effect that after the afore mentioned meeting, the defendants had a discussion amongst themselves. It was decided that the shares would be sold at RM220m but that if Gold Bridge could satisfy the conditions enumerated in para 51 above, the discount of RM10m as requested could be given. DW3 emphasised that this was a discount to the sale price and that it was in no way a goodwill payment for the plaintiff. Although they knew that the plaintiff was assisting in some aspects of the sale, they thought that he was doing so as the agent for Gold Bridge. However, the sale price eventually remained at RM220m as Gold Bridge could not meet the conditions set by the defendants.

[53] DW3 was insistent that the defendants did not engage the plaintiff's services and did not agree to pay him anything. As to why the plaintiff was paid RM50,000, he reiterated the testimony of the other defendants that the payment was in response to the plaintiff's appeal as per his letter dated 31 October 2002. It was true that they had requested for the letter and the plaintiff had then put it in writing. The monies was paid on an ex gratia basis to defray his out of pocket expenses. It was also agreed that if the sale could be completed, they would also pay him 50% of the 1% of the sale price. They had decided this because they had felt sorry for the plaintiff as Gold Bridge had apparently not paid him anything. DW3 conceded that none of the defendants had objected in writing to the plaintiff's letter.

[54] The sale of LUSB shares to Gold Bridge was terminated as SC's approval contained conditions which were not agreed to by the defendants. The defendants' solicitors, Messrs Nik Saghir & Ismail was directed to issue the termination letter dated 3 December 2002 which was delivered by DW3 personally to PW2 on 5 December 2002 in the presence of the third defendant, the eighth defendant as well as the plaintiff. DW3 testified that when the letter was delivered, PW2 appealed to him to cancel the termination letter but that he refused to do so. DW3 told the court that he had never agreed to hold the termination letter. The defendants signed with the new purchaser on 5 December 2002.

[55] DW3 disputed PW2's evidence that he, DW3, had wanted to give the plaintiff RM6.7m but that the plaintiff wanted RM10m.

[56] DW3 explained during re-examination that the approvals for the sale should all have come in before 18 August 2002. When the approvals were not obtained before that date, the defendants terminated the contract. After the termination, they looked at other offers and there were negotiations with third parties. Even so, the defendants had always said that Gold Bridge would be given first preference to conclude the deal before they signed with someone else. This was evidenced by the fact that:

(a) they extended the validity of the agreement;

(b) they allowed a longer period for Gold Bridge to get the approvals; and

(c) even though the final FIC and SC approvals were received after the expiry of the second extension, the defendants were okay about that.

[57] DW3 denied that they terminated the agreement with Gold Bridge because they had wanted to avoid paying the plaintiff the agreed fee of 50% of 1% of the share sale price. The plaintiff was not paid the fee because the sale transaction did not go through.

A EVALUATION OF THE EVIDENCE AND FINDINGS

[58] In coming to a decision in this case, the court has carefully perused the evidence adduced by all the witnesses, both for the plaintiff as well as the defendants. The court has also carefully considered all the documentary evidence including all relevant contemporaneous correspondences between the parties.

[59] The plaintiff's claims are premised on his appointment as agent by the defendants. As such, the first and main issue for determination by the court is whether the plaintiff has successfully established that he was appointed as agent and, if so, the terms of such appointment.

[60] It is undisputed that there is no written agency agreement between the plaintiff and the defendants, or between the plaintiff on the one hand and the defendants and Gold Bridge on the other. If there had been such a written agency agreement as aforesaid, in all probability this case would not have been before the court today.

[61] It is the plaintiff's case that on or around early September 2000 the second defendant, Mustaffa Kamil bin Md Ismail, on behalf of all the defendants, orally appointed the plaintiff as their agent. In return for his finding a purchaser for the defendants' LUSB shares for RM220m, he was allegedly promised a professional fee of 2% of the share purchase price. The defendants, through the first, second and third defendants, have strenuously denied that they had appointed the plaintiff as their agent. They maintain that they had always thought that the plaintiff was the agent of the buyer, Gold Bridge. In light of the fact that there is no written agency agreement, the court will look at the supporting and surrounding evidence and contemporaneous documents to determine this issue.

[62] What were the terms of the plaintiff's alleged appointment? In his evidence in court, the plaintiff had testified that he was to find a purchaser willing to purchase the defendants' shares in LUSB; to negotiate with the purchaser, on behalf of the defendants, on the terms and conditions of the sale; to take steps to obtain the necessary approvals from the relevant authorities; and lastly to take such further actions as may be necessary to ensure that the sale is successfully completed.

[63] The plaintiff relies on his letter of 31 December 2002 in support of his claim that he was the defendants' agent. Does this letter point to the plaintiff being the agent of the defendants?

[64] The court notes the defendants' contention that the opening line of this letter which uses the words 'I acted *as agent for* the purposes ...' did not state that he acted as agent *for the defendants*. Whilst it is true that the words 'for the defendants' are missing, looking at the contents of the entire letter as a whole, the court is unable to summarily dismiss it as reflective of the plaintiff not being an agent of the defendants based only on the absence of those words. The court notes from the contents of the letter that the plaintiff was recounting what he was supposed to do 'to ensure the successful completion' of the share sale transaction. It is also a letter to put in writing his request to be paid professional fees for services rendered. The plaintiff was asking for 2% of the purchase price of RM220m less 50% which was to be paid by the purchaser.

[65] It is also pertinent to ask the question: Since the plaintiff was also expecting to collect 1/2 of the 2% of the purchase price from the purchaser, was the plaintiff also acting as agent for Gold Bridge? The court notes the plaintiff's answer that he 'acted for the vendor as well as the purchaser' when queried as to why he did not state in the said letter that he acted as the defendants' agent. However, Gold Bridge had also not acknowledged that the plaintiff acted for them. This is reflected in both the letter from Gold Bridge's solicitors as well as the testimony of Abdul Aziz bin Sheikh Fadzir (PW2) himself.

[66] As such, in respect of the plaintiff's letter dated 31 October 2002 (pp 66–67), the court finds that it is, at best, a letter from the plaintiff himself to the defendants and copied to Gold Bridge and the defendants' solicitors putting in writing his claim for payment of professional fees at 2% of the purchase price and service tax of 5% amounting to RM4,620,000. This amount was to be shared by the defendants and Gold Bridge. The court finds that there is nothing on this document which indicates that the defendants had agreed that they were liable to pay the amount of RM2,310,000. The court accepts the evidence of Rauyah Bee bt Abdul Hamid (DW2) that she wrote the word 'Terima' and signed on p 87 because the plaintiff had asked her to acknowledge receipt of the letter. Her evidence in this respect is entirely plausible taking into account that she signed on 31 October 2002, the same day as the date of the letter. The court does not accept that the word 'Terima' amounts to an acknowledgement by DW2 on behalf of the defendants that they were liable to pay the plaintiff the sum of RM2,310,000 as professional fees. Surely a decision of such magnitude could not have been decided by DW2 alone and some time would have been required to obtain the agreements of the other defendants.

[67] The court is not unmindful of the plaintiff's contention that the defendants had not protested or written in to refute the contents of the 31

October 2002 letter. The plaintiff argues that the defendants, as former senior ranking officers of UDA Holdings, should have refuted the contents of the said letter if indeed it was not true. In considering whether there is any truth or basis to this contention, the court has carefully sieved through the evidence adduced in connection with the circumstances that had given rise to the issuing of this letter.

[68] The court notes that by this date, 31 October 2002, the share sale agreement had been signed for more than seven months (since 19 March 2002). It is obvious from the contents and tone of this letter that the plaintiff, whether he was the agent for Gold Bridge, or the defendants, or both of them together, had not been paid or at all for his work. The court is of the view that if indeed the plaintiff had been appointed as agent by the defendants or Gold Bridge or by both of them together, he would not have waited for more than seven months before he broached the subject of payment.

[69] The court has also considered the evidence adduced from the third defendant (DW2) that the plaintiff had approached her for some payment to be made to him since Gold Bridge had not paid him anything at all. In her position as a director of LUSB and in charge of finance and an accountant by profession, she knew that she could not make any payment to the plaintiff without something in writing as there was nothing stated about fees in any of the documents that she had. She confirmed that it was in light of these circumstances that she told the plaintiff to write in, hence the letter of 31 October 2002 and the words 'As requested ...' appearing therein.

[70] The court further notes that evidence was led that following receipt of this letter, the defendants had a meeting to discuss the plaintiff's letter. This meeting would be consistent with DW2's testimony that the word 'Terima' and her signature on the letter were merely an acknowledgement of receipt as she could not commit the rest of the defendants to the payments requested by the plaintiff. In the final analysis, the defendants *did not agree* to the professional fees of 1% of the purchase price of RM220m. All they were prepared to pay was half of the 1% requested for and according to the defendants, and this fact was conveyed by them to the plaintiff verbally. The court finds that if the plaintiff had been informed verbally about the results of his appeal letter, this would explain the absence of a written response to the plaintiff's letter.

[71] The plaintiff has set much store on LUSB's letter dated 5 November 2002 (p 49) and the payment of RM50,000 to Messrs Nik Saghir & Ismail as stakeholders. What then is the significance of this letter?

[72] The court has carefully examined this letter. It is noted that the subject of the letter is stated as:

> Interim Payment-Professional Fees Re-Sale of LANDAS UTAMA Sdn Bhd to Gold Bridge Engineering & Construction Bhd.

It cannot be denied that vide this letter LUSB made an interim payment of RM50,000 being 'the vendor's portion of the professional fees'. The payment was made to Messrs Nik Saghir & Ismail as instructed by the plaintiff. Further, the second paragraph of the said letter states that:

> The balance of the fees due from the Vendors will be paid upon successful completion of the Sale & Purchase pursuant to Clause 6 of the Sale and Purchase Agreement.

[73] After looking at the totality of all the evidence adduced on the issue of whether the plaintiff was the agent of the defendants, the court finds that the plaintiff has not succeeded in proving, on a balance of probabilities, that he had been appointed by the defendants as their agent from August or September 2001. Whilst the court is in agreement that the law does not require an agency agreement to be in writing (*KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233), it cannot be denied that the existence of a written agreement will have put paid to any dispute as to its existence. Where there is no written agreement and the fact of the agency is in dispute, the court will have to look at all the surrounding facts as well as the evidence afforded by contemporaneous documents to attempt to decipher the true situation. The court finds that the evidence as adduced does not support the plaintiff's contention that he was appointed as agent by the defendants from the beginning. The court finds that the plaintiff has not succeeded in proving, on balance of probabilities, that the defendants had agreed to appoint him as their agent in respect of the sale of their LUSB shares. The court finds that the actions of the parties would be more indicative of there being no such agreement *at the onset*. The court finds that the defendants were of the belief that the plaintiff was the agent of the interested party, Gold Bridge and contemporaneous documents would tend to support this finding.

[74] However, the court finds that after the plaintiff's appeal to DW2 to be paid some monies and further after receipt of his letter dated 31 October 2002, the defendants could not but be aware that the plaintiff was claiming from them half of the professional fees. The court has heard from DW1 and corroborated by DW2 and DW3 that the defendants, after a meeting amongst themselves, had agreed to pay 50% of what the plaintiff had asked for if the sale to Gold Bridge was successfully completed. Based on their evidence in court and LUSB's letter signed by DW2, the court finds that as at 5 November 2002 there existed a relationship of sorts between the plaintiff

and the defendants. Notwithstanding DW3's evidence that the sum of RM50,000 was paid on an ex gratia basis to defray the plaintiff's out of pocket expenses, the court finds that this payment was in fact an interim payment of professional fees as spelled out in the letter. That being so, it follows there from that as at that date, there existed a contract or agreement or arrangement between the parties. The terms of this agreement or arrangement, as admitted by the defendants, is that if the sale to Gold Bridge was successfully completed, they would pay the plaintiff half of what was asked, that is 50% of the 1% of the purchase price. 'Successful completion' means that all approvals must be given and agreed with no conditions detrimental to the defendants. Further, the full purchase price has to be settled in full.

[75] It is undisputed that the sale of the LUSB shares was never completed. The defendants terminated the share sale agreement on 3 December 2002. Although the plaintiff has alleged mala fide on the part of the defendants in terminating the sale to Gold Bridge claiming that the termination was aimed at denying him of his fees and goodwill payment, the court finds that the issue about whether the share sale agreement was legally and lawfully terminated is moot. Gold Bridge's case against the defendants in respect of the termination was dismissed by the High Court and the decision has been upheld by the Court of Appeal.

[76] The court finds that since payment of professional fees is dependant and conditional upon the 'successful completion of the sale and purchase' to Gold Bridge, the eventual termination of the sale to Gold Bridge renders the defendants no longer liable to pay any sums to the plaintiff. The court notes that there is no suggestion by the plaintiff that the defendants had agreed to pay him professional fees whether or not the sale to Gold Bridge materialised. The court finds the plaintiff's allegation that the defendants deliberately refused to complete the sale to Gold Bridge but chose to sign with Mesra merely to avoid paying professional fees and goodwill payment to the plaintiff to be totally devoid of merit. It was obvious that the proposed sale to Gold Bridge, having dragged on for a considerable length of time whilst awaiting the various approvals, would have dragged on even more whilst Gold Bridge sought to appeal against SC's conditional approval, would not have brought the same consideration to the defendants as the sale to Mesra. Based on the foregoing, the court finds that the plaintiff has failed to make out a case against the defendants for payment of professional fees on a balance of probabilities.

GOODWILL PAYMENT

[77] The plaintiff has also made a claim for a RM10m goodwill payment

allegedly agreed to by the defendants on 10 August 2001 which claim has been strenuously denied. The plaintiff claims that on 9 August 2001, the first defendant promised him a further sum of RM6.7m as goodwill, on top of the professional fee of 2% of the share sale purchase price. The document that he relies on in support of this contention is the note or memo at p 65. The plaintiff next contends that the defendants increased their promised goodwill payment from RM6.7m to RM10m on 10 August 2001 and the document relied on here is the letter at pp 9–10. According to the plaintiff, this promised RM10m was for obtaining the approvals or for expediting the obtaining of approvals.

[78] The court has carefully perused the two documents relied on by the plaintiff to gauge their contents and significance. The first defendant, DW3, does not deny that he attended the meeting on 9 August 2001 or that he wrote the handwritten note on p 65. Looking at the contents of the said note, which appears to set out the terms for the sale of the LUSB shares, the court has no hesitation in accepting the explanation of DW3 that PW2 had asked for a reduction of the price by RM10m from RM220m. He had initially agreed to reduce the price by RM6.7m but subject to conditions. Subsequently, after a meeting with the other defendants, it was agreed to grant a discount of RM10m as requested if Gold Bridge could meet the defendants' conditions. The court finds that the contents of the letter at pp 9–10 are consistent with DW3's evidence.

[79] The court finds that there is no mention of or at all in both p 65 or pp 9–10 to the effect that the RM6.7m or RM10m were payments meant for the plaintiff. The court finds that it is unbelievable for the plaintiff to contend that they were so.

[80] The share sale agreement, whilst containing a clause which states that professional fees shall be borne equally and paid by the respective parties, does *not* define what is encompassed by the term 'professional fees'. We do know that they are *not* the costs of and incidental to the agreement including costs of application for the necessary approvals and consents and stamp duties as these are clearly described as being payable by the purchaser. They are not solicitors' costs as these are to be borne by the respective parties. There is also no mention of the quantum of the professional fees.

[81] The court finds that p 65 as well as pp 9–10 are documents evidencing the progress of negotiations between the defendants as vendors and Gold Bridge as the potential buyer and would contain terms and conditions for the sale. If it was not seen as necessary to include any words about the professional fee due to the plaintiff or the quantum of such fee, the court is

unable to see why mention of far bigger amounts of RM6.7m and RM10m should be presumed to be payments for the plaintiff.

[82] The plaintiff, during re-examination, brought in the name of Datuk Abdul Aziz bin Sheikh Fadzir (PW2) whom he alleged heard DW1's promise of the RM10m payment. The court has severe reservations about the veracity of this evidence seeing that it was raised for the first time during re-examination and was neither pleaded nor mentioned in the plaintiff's witness statement. PW2, when called, claimed that he heard the DW3 saying that he would give a goodwill of RM6.7m to Hamid Merican. The payment was allegedly for doing a lot of work getting various approvals from the ministries. PW2 further claimed that the plaintiff was negotiating for RM10m but that he left the meeting earlier. And a day or two later the plaintiff told him that the defendants had agreed to give him RM10m.

[83] The court notes that whilst PW2 had insisted that he had not asked for a discount, the plaintiff had in fact pleaded in para 5 of his reply that PW2 had asked for a reduction of the purchase price at the meeting on 9 August 2001. However, when referred to p 9 and the words 'A discount of RM10m to be granted for goodwill' appearing therein, PW2 admitted that it was possible that the RM10m was a discount to the purchase price.

[84] Upon considering the totality of the evidence adduced on this issue, the court is totally unable to accept the plaintiff's contention that he was promised a goodwill payment of RM10m for obtaining or even expediting the obtaining of the said approvals. The court finds that p 65 and pp 9–10 relied on by the plaintiff does not in any way support his contention. The court is unable to accept PW2's evidence as regards hearing DW3 offering the plaintiff a goodwill payment of RM6.7m. It must be borne in mind that PW2 would have no love lost for the defendants after their attempt to purchase the LUSB shares fell through. The court recalls evidence of the High Court case between them and the subsequent appeal in the Court of Appeal. The manner in which the evidence of PW2 came to be introduced must also be borne in mind.

[85] As such, after considering the evidence adduced by both parties, the court is satisfied that the RM6.7m and RM10m mentioned in the documents at p 65 and pp 9–10 respectively refers to a discount to the sale price agreed to be given to Gold Bridge if certain conditions were met. These would include, inter alia, the payment of the balance price in cash by 18 April 2002. The court accepts the evidence of the defendants that this discount was in no way a promised goodwill payment for the plaintiff. The court finds it inconceivable and illogical that the defendants would agree to pay such an exorbitant sum of money to the plaintiff for services which were stated in the

share sale agreement to be the responsibility of the purchaser. As such, on this issue of the goodwill payment, the court finds that the plaintiff has failed to make out a case against the defendants on a balance of probabilities.

[86] The plaintiff in his submissions has raised various other issues such as estoppel, bad faith and quantum meruit. As pointed out by learned counsel for the defendants, all these issues were not pleaded and were raised for the first time during submissions. It was also not part of the list of issues to be tried as agreed between the parties. The authorities cited by learned counsel for the defendants would support his submission.

[87] In the case of *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ (Rep) 239, the Supreme Court emphasised the importance of pleadings in a civil suit. In his judgment, His Lordship Mohd Jemuri Serjan ASJ referred to the decision in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 where Sharma J held at p 197 as follows:

> A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure.

[88] Learned counsel for the defendants has also relied on the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysia Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where the Federal Court held that estoppel is a matter which is required to be pleaded under the rules of court, as exemplified by rr 7(1) and 8(1) of O 18 of the Rules of the High Court. However, the requirement of these rules is sufficiently met if material facts giving rise to estoppel are sufficiently pleaded without actually using the term 'estopped'. Thus, although courts do normally require estoppel to be pleaded, there is also judicial recognition of circumstance that may take a particular case out of the governing principle.

[89] In the case of *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633, Edgar Joseph Jr SCJ held at p 656 as follows:

> However, neither fraud nor representation had ever been alleged by the plaintiff in their pleadings — not even generally — although it is settled law that where it is sought to rely upon a plea based thereon, the allegations relating thereto must be pleaded and particularised, in which case, the onus lies upon the parry making the allegations to prove the same beyond reasonable doubt (see *Saminathan v Pappa*; *Lee You Sin v Chong Ngo Khoon*). It is therefore right to say, at the risk of being trite, that on this ground alone, the allegations made by way of cross-examination by counsel for the plaintiff and in his submission, should be given short shrift and dismissed.

[90] The court has attempted to understand the plaintiff's submissions on this issue without much success. Apart from the sub-heading which includes the words 'Estoppel of Facts', the court is quite unable to see where counsel was going in his submissions. Is he saying that the defendants have admitted or acknowledged the plaintiff's contributions vide these two letters and is therefore estopped from denying that he had done work towards the sale to Gold Bridge? If so, the court has already addressed this issue. The court has found the word 'Terima' affixed by DW2 at p 67 to be but a mere acknowledgment of receipt of the plaintiff's letter at pp 66–67. As far as p 49 is concerned, the court was satisfied that whilst this letter can be seen as an agreement *as at that date* to pay professional fees, the balance of such fees need not be paid as there was no successful completion of the sale purchase agreement between the defendants and Gold Bridge.

[91] As far as the plaintiff's submissions on unjust enrichment and quantum meruit are concerned, the case of *David Wong Hon Leong v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155 cited by learned counsel for the plaintiff must be distinguished. In that case, the respondent was promised RM268,888 for assisting in obtaining the required approval for conversion and subdivision of the company's land. In that case the respondent expended his exertions to securing the Menteri Besar's support for the company's application and the approval was obtained. The facts of the case in *David Wong* are different from the facts of our instant case. The one and only letter which can be seen as supportive of the plaintiff's claim, namely LUSB's letter of 5 November 2002 (p 49) clearly speaks of the balance of fees being payable 'upon successful completion of the sale and purchase'. This is not a case of promise to pay upon obtaining of approvals. Thus even though the plaintiff may have expended time and effort in obtaining approvals, as long as the share sale agreement was not completed, it could not be said that the plaintiff had accomplished what he was supposed to do to be entitled to payment. The court thus finds that the plaintiff's complaints about unjust enrichment and quantum meruit to be unsupportable.

[92] A word about the plaintiff's claim for 5% of the professional fees for service tax. Section 8(1) of the Service Tax Act 1975 provides that every taxable person who carries out a taxable service shall apply for a license. A taxable person is defined under the Service Tax Regulations 1975 as a person who provides a consultancy service having a total annual sales turnover of more than RM150,000. The court finds that although the plaintiff is a taxable person under the Service Tax Regulations 1975, he had admitted to not having a license to carry on the business of providing a taxable service. The court finds the plaintiff's claim that he did not require a license to be quite beyond belief.

[93] In light of the fact that the plaintiff did not possess a license to collect service tax, the court finds that the plaintiff is guilty of an offence under the Act for carrying on a taxable business and attempting to collect service tax without a license. It follows there from that the court cannot conceivably allow such attempt.

CONCLUSION

[94] In conclusion the court finds that the plaintiff has not succeeded in proving on balance of probabilities, that he was entitled to be paid any amount as outstanding professional fees whether RM4,570,000 or RM2,260,000. As far the alleged goodwill payment is concerned, the court finds the claim to be totally without basis. The promised goodwill payment of RM10m was clearly an offer of discount over the sale price for Gold Bridge if the sale could be completed by 18 April 2002 and the balance payment made in cash. The court finds the plaintiff's claim of RM10m as a promised goodwill payment to be dishonest in the extreme.

[95] Based on the foregoing, the plaintiff's claim as well as alternative claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum